

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

In re

No. 95-13393

AFP, Incorporated

Debtor

Hilco Trading Company

Plaintiff

Adversary Proceeding
No. 96-1003

v.

Wal-Mart Stores, Inc.; and
Douglas R. Johnson, Trustee

Defendants

MEMORANDUM

Appearances: Carl E. Hartley, Baker, Donelson, Bearman & Caldwell, Chattanooga,
Tennessee, Attorney for Plaintiff

Thomas E. Ray, Ray & Bolen, Chattanooga, Tennessee, Attorney for
Defendant Wal-Mart Stores, Inc.

Gary R. Patrick, Patrick, Beard & Richardson, Chattanooga,
Tennessee, Attorney for Defendant Douglas R. Johnson, Trustee

Hilco Trading Company brought this suit to establish the priority of its security interest over the claims of Wal-Mart and the bankruptcy trustee. Hilco's complaint alleges: AFP operated photography studios in Wal-Mart stores both before and during AFP's chapter 11 bankruptcy case; Wal-Mart collected money due to AFP for work done by AFP during its chapter 11 case; Wal-Mart has collected the commissions and warranty reserve due to it and is still holding about \$63,000 of the money collected; this money is subject to Hilco's security interest; Hilco's security interest is superior to any claims by Wal-Mart or AFP's bankruptcy trustee, and therefore, the money should be paid to Hilco. The complaint asks for a money judgment against Wal-Mart and a declaratory judgment against the bankruptcy trustee.

Wal-Mart and Hilco have agreed to a settlement under which Hilco has released all its claims against Wal-Mart in return for payment of \$34,500. Based on the settlement, Wal-Mart has filed a motion for summary judgment. The question is whether to grant Wal-Mart's motion for summary judgment.

The trustee's response to Wal-Mart's motion stated that the trustee intended to file a counterclaim against Hilco and did not oppose summary judgment for Wal-Mart if it would not affect his rights against Hilco. After filing this response to the motion, the trustee filed an answer to the complaint with counterclaims against Hilco. The answer also includes a cross claim against Wal-Mart.

Wal-Mart's summary judgment motion does not deal with the trustee's cross claim since it was filed after the motion. Therefore, the court will not consider whether Wal-

Mart is entitled to summary judgment on the trustee's cross claim. The question is only whether to grant summary judgment for Wal-Mart on Hilco's claims against it.

The court can grant summary judgment to Wal-Mart only if there is no genuine issue of material fact and Wal-Mart is entitled to judgment as a matter of law. *Fed. R. Bankr. P.* 7056(c). A release or settlement removes genuine issues of material fact and entitles the defendant to judgment as a matter of law *if* there is no genuine issue of material fact as to the validity and enforceability of the settlement or release. See, e.g., *Acquisition Corp. of America v. Federal Deposit Insurance Corp.*, 760 F.Supp. 1558 (S. D. Fla. 1990); *Nevets C. M., Inc. v. Nissho Iwai American Corp.*, 726 F.Supp. 525 (D. N. J. 1989) *aff'd* 899 F.2d 1218 (3d Cir. 1990) (Table); *Milwee v. Peachtree Cypress Investment Co.*, 510 F.Supp. 279 (E. D. Tenn. 1977). Neither Hilco nor the trustee has questioned the validity and enforceability of the settlement between Wal-Mart and Hilco.

The settlement raises one question as to whether it disposes of all Hilco's claims against Wal-Mart. The settlement provides that Wal-Mart will indemnify Hilco if the trustee recovers from Hilco. This indemnity agreement is a new source for a potential claim by Hilco against Wal-Mart; it does not preserve any claim made by Hilco in its complaint. Thus, Wal-Mart appears to be entitled to summary judgment.

Nevertheless, this type of proceeding can raise problems that prevent summary judgment. It is essentially like an interpleader action. It began with one party, Wal-Mart, in possession of money subject to claims by Hilco, the trustee, and Wal-Mart. The question is whether summary judgment for Wal-Mart, as to Hilco's claims against it,

will affect the remaining claims and defenses among the parties. See *United States v. McFaddin Express*, 197 F.Supp. 289 (D. Conn. 1961); *Fife v. Barnard*, 186 F.2d 655 (10th Cir. 1951).

Will summary judgment for Wal-Mart on Hilco's claims against Wal-Mart affect the trustee's counterclaims against Hilco or his cross claim against Wal-Mart? The trustee could possibly be caught in a crossfire of arguments — with Hilco arguing that Wal-Mart should be treated as still having possession of the money and Wal-Mart arguing that Hilco should be treated as having possession.

Hilco, however, cannot deny the effect of the settlement. It treats Wal-Mart as no longer having possession of the money in question. It leaves Hilco only with a potential indemnity claim against Wal-Mart. In this situation, Hilco can not avoid liability to the trustee on the theory that Wal-Mart still has the money.

Of course, this means that the settlement affects Hilco's defenses against the trustee. Before the settlement, Hilco could argue that the trustee might be entitled to a declaratory judgment against it but not to any money judgment, because Wal-Mart had the money. Hilco and Wal-Mart must have intended the settlement to have this result; between Hilco and Wal-Mart, the settlement substitutes Hilco for Wal-Mart as the stakeholder (the party with possession of the property).

This suggests that the trustee should be able to obtain only a declaratory judgment against Wal-Mart, not a money judgment. The court, however, has already

decided to treat Wal-Mart's pending motion for summary judgment as not dealing with the trustee's cross claim against Wal-Mart. Furthermore, summary judgment for Wal-Mart as to Hilco's complaint may not affect the trustee's cross claim against Wal-Mart. For the present, the trustee's cross claim will remain pending and unaffected by the settlement or by summary judgment for Wal-Mart as to Hilco's claims. *Fife v. Barnard*, 186 F.2d 655 (10th Cir. 1951).

Finally, the court should point out that a summary judgment for Wal-Mart on Hilco's claims against it will not be a final and appealable judgment. Rule 54 deals with the effect of a judgment on part of the claims in a proceeding that involves multiple claims. A judgment on part of the claims is final and appealable only if the court expressly determines that there is no just reason for delay and directs the entry of a final judgment. If the court does not do this, then the decision does not terminate the action as to any of the claims or parties and the decision is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of the parties. *Fed. R. Bankr. P. 7054(b)*. The court declines to make the judgment final. This leaves it subject to revision for the purpose of doing justice as to the remaining claims.

The court will enter an order granting summary judgment to Wal-Mart with respect to Hilco's claims against it.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

At Chattanooga, Tennessee.

BY THE COURT

entered 8/9/1996

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
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ORDER

In accordance with the Memorandum entered by the court,

It is ORDERED that summary judgment is granted to the defendant, Wal-Mart Stores, Inc., on the claims made by the plaintiff, Hilco Trading Company, in this proceeding.

ENTER:

BY THE COURT

entered 8/9/1996

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE